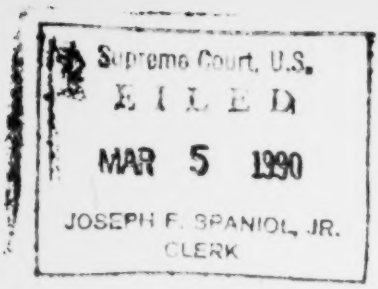
89- 1550



No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER 1989 TERM

JERRY C. PENDERGRASS, Petitioner,

vs.

STATE OF TENNESSEE, Respondent.

On Petition for Writ of Certiorari
to the Court of Criminal Appeals
of Tennessee

PETITION FOR A WRIT OF CERTIORARI

DONALD E. DAWSON
Attorney of Record for Petitioner
808 Broadway, Third Floor
Nashville, Tennessee 37203
(615) 726-0684

JOHN E. HERBISON
Attorney for Petitioner
1205 Eighth Avenue South
Nashville, Tennessee 37203
(615) 242-4200

QUESTIONS PRESENTED FOR REVIEW:

1) Whether the First and Fourteenth Amendments prohibit a State trial court from conditioning consideration of probation for a defendant convicted of an obscenity offense upon such defendant's closing a bookstore dealing in erotic materials which have not been adjudicated to be obscene and where neither any such materials nor any description of the contents thereof is in evidence.

2) Whether the government in an obscenity prosecution is constitutionally required to offer evidence of contemporary community standards where the material in question portrays explicit sexual conduct appealing to a "deviant sexual group" within the meaning of *Mishkin v. New York*.

3) Whether a State obscenity statute is unconstitutional as applied in a proceeding where the subject materials explicitly depict homosexual activities and where application of the *Mishkin v. New York* "deviant sexual group" doctrine to the prurient interest requirement of such statute has been construed by State courts to place the burden upon the accused of showing that such materials are designed for and marketed to a specific deviant group.

4) Whether *Miller v. California* should be modified or overruled so as to render the Tennessee obscenity statutes unconstitutional.

LIST OF PARTIES:

The parties to the proceedings in the trial court were the State of Tennessee and the Defendants Jerry C. Pendergrass, individually, and Choo Choo Video and Keith Video/Broadway Books, two retail bookstore establishments owned and operated by a corporation of which Mr. Pendergrass is the principal shareholder. The parties in the Court of Criminal Appeals of Tennessee and on this petition for writ of certiorari are the State of Tennessee and Jerry C. Pendergrass, individually.

TABLE OF CONTENTS:

Questions Presented for Review . . .

List of Parties i

Table of Contents ii

Table of Contents for Appendix . . . iii

Table of Authorities v

Opinion Below 1

Grounds of Jurisdiction 1

Constitutional Provisions to be Reviewed 2

Statutes to be Reviewed 3

Statement of the Case 5

Reasons for Allowing the Writ . . . 16

Conclusion 40

Certificate of Service 41

Table of Contents for Appendix:

Opinion of Court of Criminal Appeals of Tennessee 1

Excerpt of Transcript of Trial Court Hearing of Motion for New Trial (including relevant finding of fact) 31

Excerpt of Transcript of Sentencing Hearing (including remarks of trial court upon which an issue raised herein is based) 37

Order of Court of Criminal Appeals Denying Rehearing 48

Order of Supreme Court of Tennessee Denying Permission to Appeal . . . 50

Motion to Correct or Reduce Sentence in the Trial Court 51

Motion for Judgment of Acquittal in the Trial Court 54

Motion for New Trial in the Trial Court 57

Order Granting Defendant-Appellant's Application for Stay of Mandate and Release on Bond Pending Review by United States Supreme Court . . 61

TABLE OF AUTHORITIES:

CASES:

A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964) 20

Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W.2d 370 (1975) 24

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) 29

Fort Wayne Books, Inc. v. Indiana, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) 21

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988) . . 24

FW/PBS, Inc. v. City of Dallas, ___ U.S. ___, 58 U.S.L.W. 4079 (January 9, 1990) 24

Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983) . . 23

Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) . 19, 23

Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971) 29

Leech v. American Booksellers Association, Inc., 582 S.W.2d 738 (Tenn. 1979) 27

Marcus v. Search Warrants of Property at 104 East Tenth Street, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) 20

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) 27, 37, 38, 39

Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16L.Ed.2d 56 (1966) 25, 27, 28, 29, 31, 33

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 33, 34

New York v. P.J. Video, Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986) 20, 21

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) 28, 39

Perrine v. Municipal Court for the East Los Angeles District Judicial District of Los Angeles County, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den'd, 404 U.S. 1038, 92 S.Ct. 710, 30 L.Ed.2d 729 . . . . . .18, 19, 24

Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) 38

Porth v. Templar, 453 F.2d 330 (10th Cir. 1971) 18

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) 27,.37, 38, 39

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1960) 17

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) 22, 23

Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) 34, 35

State of Tennessee v. Jerry C. Pendergrass, Court of Criminal Appeals of Tennessee No. 1119 (September 20, 1989) (Appendix at pp. 1-14) . . ***passim***

State v. Rogers, 703 S.W.2d 166 (Tenn.Crim.App. 1985) 26

State v. Summers, 692 S.W.2d 439 (Tenn.Crim.App. 1985) 26, 32

Taylor v. State, 180 Tenn. 62, 171 S.W.2d 403 (1943) 25

United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," 373 F.2d 635 (4th Cir. 1967) 29

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), cert den'd 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 32

United States v. Klaw, 350 F.2d 155 (2d Cir. 1965) 28

United States v. Petrov, 747 F.2d 824 (2d Cir.1984), cert den'd 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 318 31

United States v. Thomas, 613 F.2d 787 (10th Cir. 1980) 30

United States v. Treatman, 524 F.2d 320 (8th Cir. 1975) 32

United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974) 30, 31

Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) 36

Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) *(per curiam)* 21, 22

STATUTES:

Tennessee Code Annotated § 39-6-1101 . 33

Tennessee Rules of Criminal Procedure, Rule 33(d) 25, 29

28 United States Code § 1257 1

OPINION BELOW:

On January 2, 1990, the Supreme Court of Tennessee denied permission to appeal from the decision of the Court of Criminal Appeals of Tennessee. The opinion of the Court of Criminal Appeals was filed on September 20, 1989 and appears in the appendix to this petition at pages 1-32 thereof. The Court of Criminal Appeals denied rehearing in an order of October 16, 1989, a copy of which appears at pages 48-49 of the appendix. The Order of the Supreme Court of Tennessee denying permision to appeal appears at page 50 of the appendix.

GROUNDS OF JURISDICTION:

The jurisdiction of this Court is invoked pursuant to 28 United States Code § 1257(a).

CONSTITUTIONAL PROVISIONS TO BE REVIEWED:

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES TO BE REVIEWED:

Tennessee Code Annotated § 39-6-1101:

Definitions for obscenity law. -- Definition of terms as used in §§ 39-6-1101 -- 39-6-1115 shall be as follows:

* * *

(5) "Obscene" means:

(A) That the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(B) That the work depicts or describes, in a patently offensive way, sexual conduct; and

(C) That the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

* * *

(8) "Prurient interest" means a shameful or morbid interest in sex ... [Acts 1974 (Adj. S.), ch. 510, § 2; T.C.A., §§ 39-3010, 39-3001.] [Repealed November 1, 1989; identical definitions appear in the newly-enacted T.C.A. § 39-17-901 at subsections (6) and (8).]

Tennessee Code Annotated § 39-6-1104:

> **Importing, preparing, distributing, possessing or appearing in obscene material or exhibition -- Distribution to or employment of minors.** -- (a) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production, peep shows or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense. ... [Acts 1974 (Adj. S.), ch. 510, § 3; 1975, ch. 306, § 1; T.C.A., § 39-3013; Acts 1980 (Adj. S.), ch. 874, §§ 1,2; T.C.A, § 39-3004; Acts 1986, ch. 646, § 1.] [Repealed November 1, 1989; a substantially identical statute, T.C.A. § 39-17-902(a), is now in force.]

Tennessee Rules of Criminal Procedure, Rule 33(d):

> Upon ruling on the motion for new trial, the court, upon motion by either party, shall make and state into the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury.

STATEMENT OF THE CASE:

The Petitioner, Jerry C. Pendergrass, was convicted on July 7, 1988 by a jury in Hamilton County, Tennessee of six (6) misdemeanor counts of possession of obscene material with intent to distribute. Two businesses owned by a corporation in which Mr. Pendergrass was the principal shareholder were tried jointly with Mr. Pendergrass. The material found to be obscene which Mr. Pendergrass was individually convicted of possessing consisted of two (2) VHS videotape movies and six (6) magazines.

The content of the movies and magazines was described by the Court of Criminal Appeals of Tennessee as follows:

> The magazines "Motel Menage-A-Trois" and "All Tied Up," and the video tapes "Squirts" and "Good Sex," graphically depict men engaged in various forms of sexual conduct. The sexual conduct

> depicted includes fellatio, anal intercourse, masturbation, as well as other forms of sexual conduct. The magazines "A Hole Lot of Fucking," "Anal Climax," "Best of the Orient," and "Fuck Sucking Trios," graphically depict men and women engaged in various forms of sexual conduct. The sexual conduct depicted in these magazines includes vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, as well as other forms of sexual conduct. In two of the magazines, a dildo is placed in the woman's vagina and simultaneously inserted into her vagina and rectum. [Footnotes omitted.]

(Appendix at pp. 6-8).

A sentencing hearing was held on September 1, 1988. The State offered no evidence. The defense proof at the sentencing hearing showed that the businesses at which Mr. Pendergrass worked at the time of the offenses had been closed, and Mr. Pendergrass had since opened two (2) bookstores dealing in soft-core pornographic materials. Mr. Pendergrass

testified that he had not sold or offered for sale any material which the jury had found obscene, and that at his new stores he had deliberately stayed away from selling hard-core materials.

At the conclusion of the sentencing hearing, the court made the following remarks:

> ... Our space in the jail and the workhouse and in the penitentiary are going to have to be reserved for dangerous offenders, those that have committed violent crimes or potentially capable of committing violent crimes, also for the habitual offenders, those that continue to violate the law over and over again and are not deterred at all by any punishment imposed. And then the last category has to be--you have to have some space for individuals that you can't punish any other way. And Mr. Pendergrass comes extremely close to being in that third category. And that's what gives the Court difficulty is because I'm not sure that I can punish Mr. Pendergrass in any other way than locking him up.
>
> The reason that it results in difficulty for me is the fact that it's not an easy decision. Censorship is bad. I can't see how anybody in a democracy could be in favor of censorship. And

the Court is not in favor of censorship at all. But saying that, this Court has to follow the law the same as anyone else. And obscenity is not protected in this country. Obscenity is against the law. Mr. Pendergrass has been found guilty of possessing obscene material. He must be punished. .... Each time that I've observed Mr. Pendergrass in the courtroom, and especially when I would observe him on television, as I observed him on television last night, he insists, of course, that he's going to do what he wants to do. And far be it from me to tell him he cannot exercise his constitutional rights, and he can exercise those rights right up to the point where he steps over the line and violates the law. ...

I'm not going to engage in censorship but if Mr. Pendergrass closes his places of business within seven days, completely closes them and does not turn those operations over to some other individual, then the Court would consider at that time whether or not he should serve some form of alternative punishment. [Emphasis added.] So I'm going to put the matter over a week and give him an opportunity to decide whether or not he wants to continue operating a business which he and the whole general public realize that he is continuing in at the time, [sic] or operating at the time that he was found guilty by a jury of possessing obscene material. He knows, as well as I know, that using the guidelines as set out in the Federal decisions that a jury in this community would determine that the material he has

> out there right now to be obscene. He knows that, as well as I know that. The jury, of course, does not determine themselves what they consider to be obscene, but they apply the standard of the average person in the community. And he knows, as well as I do, that the average person in this community would find what he is selling out there to be obscene. So I'm giving him seven days to close up his operation.

(Appendix at pp. 42-46).

Mr. Pendergrass, through counsel, advised that he was unwilling to close his bookstores, and the trial judge imposed a sentence of six (6) months' incarceration as to each count, to be served concurrently. (Appendix at p. 47).

Post-trial motions for new trial, for judgment of acquittal and for correction or reduction of sentence were timely made and overruled on October 21, 1988. Question number (1) presented herein was addressed to the trial Court on the motion to correct or reduce sentence. (Appendix

at pp. 51-53). Question number (2) presented herein was addressed to the trial Court on the motion for judgment of acquittal. (Appendix at p. 54-56). The question of whether the Tennessee obscenity statute is unconstitutional was presented to the trial Court on the motion for new trial solely to preserve the record, (Appendix at pp. 57-60), with the acknoledgement that the Supreme Court of Tennessee had previously ruled contrary to the Defendant's position and that the trial Court was bound thereby.

At the hearing of the new trial motion, the trial Court at the Defendant's request made and stated into the record the following as findings of fact:

> MR. HERBISON*: Okay. Your Honor, are you making a finding of fact that the materials were in fact designed to appeal to a specific deviant group?
>
> THE COURT: Yes.

MR. HERBISON: Each material?

THE COURT: Yes, definitely. There's no question in my mind. The forty-five minutes watching that second movie is probably the worst forty-five minutes I've spent in almost fifty-six years, without question.

MR. BEVIL*: Of course, Your Honor, the magazines were a little bit different. Some of the magazines dealt with homosexual material. Some of them dealt with heterosexual material.

THE COURT: Yes, some of them dealt with---I think one of them had a threesome in it or something, so some of it was heterosexual, the magazines. But the two movies that we saw, one short and one longer forty-five minute movie were definitely aimed at homosexuals. But there was one magazine that showed a threesome.

MR. HERBISON: Yes. Is the Court making a finding as to that particular magazine, as well?

THE COURT: That particular magazine would be---I guess it would appeal to heterosexuals.

---

* Defense Counsel is identified as MR. HERBISON; the Assistant District Attorney General is identified as MR. BEVIL.

(Appendix at pp. 35-36).

The Defendant appealed to the Court of Criminal Appeals of Tennessee. Question number (1) presented herein was presented to the Court of Criminal Appeals in the Defendant's Brief on Appeal. (See opinion of Court of Criminal Appeals, Appendix at pp. 24-29). Question number (2) presented herein was raised in the Court of Criminal Appeals as part of the Defendant's challenge to the sufficiency of the evidence. (See opinion of Court of Criminal Appeals, Appendix at pp. 15-16). Question number (3) presented herein was not presented to the Court of Criminal Appeals because of the trial Court's findings of fact as to the intended market group for the materials. This issue appeared for the first time in the opinion of the Court of Criminal Appeals and, in view of the trial Court's contrary finding, could not have

been foreseen. The question of whether the state obscenity statutes are unconstitutional was presented to the Court of Criminal Appeals, with the acknowledgement that the Supreme Court of Tennessee had previously ruled contrary to the Defendant's position and that the intermediate appellate Court was bound thereby. (See opinion of Court of Criminal Appeals, Appendix at pp. 17-18).

The Court of Criminal Appeals ruled adversely to the Defendant's contentions on all issues in an opinion filed on September 20, 1989. (Appendix at pp. 1-30). The Defendant submitted a timely petition for rehearing in the Court of Criminal Appeals, which was denied in an order of October 16, 1989. (Appendix at pp. 48-48).

The Court of Criminal Appeals declined to rule on Question number (2) presented herein. The Court opined that, before the State is required to show the obscene matter appeals to the prurient interest of members of a particular sexually deviant group, the accused has the burden of establishing that obscene matter is designed for and primarily disseminated to that group, and that the Defendant had not made such showing. (Appendix at pp. 15-17).

The Defendant applied for permission to appeal to the Supreme Court of Tennessee. All questions which had been presented to the Court of Criminal Appeals were presented in the application for permission to appeal, and in addition thereto, the Defendant asked the State Supreme Court to consider whether the Court of Criminal

Appeals' practice of shifting the burden of proof as to whether material was primarily intended for a sexually deviant group to the accused is unconstitutional.

The Supreme Court of Tennessee denied permission to appeal in an order of January 2, 1990. (Appendix at p. 50). The Court of Criminal Appeals, on application of the Defendant, stayed its mandate and admitted the Defendant to bond pending consideration of the instant petition for writ of certiorari in this Court. (Appendix at pp. 61-62).

REASONS FOR ALLOWING THE WRIT:

A. The State Court's denial of probation presents an important question of law as to what extent probation may be conditioned upon a surrender of First Amendment rights.

The Court of Criminal Appeals of Tennessee in this case, by affirming the trial Court's effectively conditioning the granting of probation upon the Petitioner's willingness to go out of the business of selling books and magazines which are presumptively protected by the First Amendment, decided an important question of federal law in a way in conflict with pertinent decisions of this Court, of several federal courts of appeals, and of several state courts of last resort. The trial Court based his decision upon a sight-unseen prediction that certain

unspecified materials, if considered by a jury, would be found obscene and therefore unprotected. The Court of Criminal Appeals apparently shared this assumption;[1] the appellate Court's treatment of the issue otherwise makes no sense.

It is significant that the trial Court sought not only to require Mr. Pendergrass to remove himself from a lawful business, but also to prohibit the transfer of Mr. Pendergrass's interest therein to another individual. (Appendix at p. 45). The

---

[1] "As long as the appellant continued to distribute obscene matter, he was not entitled to have his sentences suspended and be placed on probation. . . . In addition, if probation had been granted, the appellant would have been in violation of the conditions of his probation. It is generally provided that a probationer must obey the laws of the United States, the laws of this State, along with any county and city regulations." (Appendix @ p. 12; emphasis added). In that there is no state power to restrict the dissemination of books which are not obscene, *Smith v. California,* 361 U.S. 147, 155, 80 S.Ct. 215, 220, 4 L.Ed.2d 205 (1960), this language necessarily presupposes that the unseen material is obscene.

trial Court's unusual action cannot be considered as anything other than a prior restraint of unseen printed material, based upon the anticipated content of such material.

A condition of probation which prohibits speech which is not per se harmful (e.g., speech which itself violates the law or which advocates violation of the law by other persons), may be on its face a violation of the probationer's First Amendment freedom of expression. *See, Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971). To prohibit a citizen from engaging in activity protected by the First Amendment because of an obscenity conviction can be justified only where the activity thereby prohibited constitutes a clear and present danger of a serious, substantive evil. *Perrine v. Municipal Court for*

the East Los Angeles District Judicial District of Los Angeles County, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648, 653 (1971), cert. den'd, 404 U.S. 1038, 92 S.Ct. 710, 30 L.Ed.2d 729.

This principle applies to distribution of sexual materials which have not been held obscene; in a case brought by owners and employees of so-called "adult bookstores," the United States Court of Appeals for the Seventh Circuit has stated, "The freedom to operate a bookstore is unquestionably protected by the First Amendment. Preservation of freedom of expression requires protection of the means of disseminating information." *Genusa v. City of Peoria*, 619 F.2d 1203, 1218 (7th Cir. 1980).

The threshold requirements for a finding of obscenity as to any material not

presented to the jury are manifestly not met in this cause. As this Court has repeatedly stated, the finder of fact must consider each item of allegedly obscene matter independent of other materials. *See, A Quantity of Books v. Kansas*, 378 U.S. 205, 208-09, 84 S.Ct. 1723, 1724-25, 12 L.Ed.2d 809 (1964). Each material must be subject to "a procedure 'designed to focus searchingly on the question of obscenity.'" *Id.*, 378 U.S. at 210, 84 S.Ct. at 1726; *Marcus v. Search Warrants of Property at 104 East Tenth Street*, 367 U.S. 717, 732, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). At a minimum, the Constitution requires that a neutral and detached finder of fact be furnished sworn affidavits describing in some detail the contents of each piece of allegedly obscene material. See, *New York v. P.J. Video*,

Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986).

This Court has consistently recognized that the First Amendment prohibits the use of a finding of obscenity as to some materials as a basis or a pretext for closing a sex-oriented theater or bookstore. In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 927-28, 103 L.Ed.2d 34 (1989), the Court generally upheld application of a state anti-racketeering statute to "adult" bookstores, but invalidated a pretrial seizure of the entire contents of a bookstore prior to an adjudication of obscenity in an adversary proceeding. In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) *(per curiam)*, the Court struck down a prior restraint on the exhibition of movies under a state public nuisance statute. The Court

there opined that the burden of supporting a prior restraint against future expression based upon a past finding of obscenity is higher even than the standard of proof required for imposition of a criminal sanction for a past communication. 445 U.S. at 315-16, 100 S.Ct. at 1161.

In another case arising out of Hamilton County, Tennessee, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), this Court recognized that suppression of a dramatic production based upon the government's anticipation that the content thereof is obscene is a prior restraint "which avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system[,]" to wit: (1) the burden of instituting judicial proceedings,

and of proving that the material is obscene, is on the government; (2) any restraint prior to judicial review may be imposed only for a specified brief period and only for the purpose of preserving the status quo, and (3) a prompt final judicial determination is assured. 420 U.S. at 560, 95 S.Ct. at 1247.

To the knowledge of Counsel, this Court has not applied the above principles in the context of a condition for the granting of probation as a direct result of an obscenity conviction. In a context only slightly different, that of a civil disability occurring as a collateral consequence of an obscenity conviction, the Court recently declined to reach the issue of whether a person who had previously been convicted of certain crimes, including obscenity offenses, could constitutionally be disqual-

ified from receiving a license which a municipal ordinance required in order to operate a sexually oriented business.[2] *FW/PBS, Inc. v. City of Dallas*, ___ U.S. ___, 58 U.S.L.W. 4079 (January 9, 1990). The Court there ruled that no plaintiff had shown both a conviction of a specified offense and a resulting denial of a license and that therefore no party then before the Court had standing to challenge that provision of the ordinance. 58 U.S.L.W. at 4084-85. This Court should grant certiorari in the instant cause in order to set-

---

[2] The Court of Appeals for the Fifth Circuit had ruled that such disability was constitutionally permissible. 837 F.2d 1298, 1304-05 (5th Cir. 1988). Other courts have held to the contrary. *Genusa v. City of Peoria*, 619 F.2d 1203, 1218-19 (7th Cir. 1980); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1552 (11th Cir. 1983); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370, 374 (1975); *Perrine v. Municipal Court for the East Los Angeles District Judicial District of Los Angeles County*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648, 653 (1971), cert. den'd, 404 U.S. 1038, 92 S.Ct. 710, 30 L.Ed.2d 729.

tle an important question of federal constitutional law on which federal courts of appeal and state courts of last resort are divided.

B. The treatment of the *Mishkin v. New York* issue by the Court of Criminal Appeals conflicts with applicable decisions of this Court and of federal courts of appeals.

At the hearing of the Defendant's motion for new trial, Defense Counsel requested, pursuant to Rule 33(d) of the Tennessee Rules of Criminal Procedure, that the trial Court make findings of fact as to whether any of the materials found by the jury to be obscene were designed to appeal to a specific deviant group. The trial Court found[3] that both motion pictures and all

---

[3] Under Tennessee law, a trial judge's findings on a new trial motion have the weight of a jury verdict, *Taylor v. State*, 180 Tenn. 62, 171 S.W.2d 403, 405 (1943), and will not be set aside on

magazines, with one unspecified exception, were "aimed at homosexuals." (Appendix at pp. 30-31).

On appeal the Defendant argued that, as to all materials found to be "aimed at homosexuals," the evidence was insufficient as a matter of law, in that the prosecution elicited no evidence of the contemporary community standards of the "community" of Tennessee homosexuals.[4] The Court of Criminal Appeals completely disregarded the trial Court's findings, and opined, citing *State v. Summers*, 692 S.W.2d 439, 444-45 (Tenn.Crim.App. 1985), that, before the State is required to show the obscene matter appeals to the prurient

---

appeal unless the evidence preponderates against such findings. *State v. Rogers*, 703 S.W.2d 166, 169 (Tenn.Crim.App. 1985).

[4] The prosecution at trial presented no evidence of community standards apart from the material itself.

interest of members of a particular sexually deviant group, the accused has the burden of establishing that obscene matter is designed for and primarily disseminated to that group, and that the Defendant had not made such showing. (Appendix at pp. 7-8).

The Tennessee obscenity statutes are based upon this Court's decisions in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), as modified by *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Supreme Court of Tennessee has recognized that any statutory definition of "prurient interest" at variance with or broader than the language of *Roth* and *Miller* is constitutionally infirm. *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738, 750 (Tenn. 1979).

This Court in *Mishkin v. State of New York*, 383 U.S. 502, 508, 86 S.Ct. 958, 963, 16 L.Ed.2d 56 (1966), opined that:

> Where [allegedly obscene] material "is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. ...

This Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, n.6, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), citing *Mishkin* and *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965), recognized that, where allegedly obscene material is directed at a sexually deviant group, "... the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." The trial Court's finding that most of the materials are "aimed at homosexuals" (and,

by implication, that homosexuals constitute a "deviant" group), while fairly debatable, is entitled to more deference[5] than the complete disregard shown that finding by the Court of Criminal Appeals.[6] This Court has recognized that "[p]roscriptions against [homosexual] conduct have ancient roots," and that 24 states and the District of Columbia recently had provided criminal penalties therefor. *Bowers v. Hardwick*, 478 U.S. 186, 192-94, 106 S.Ct. 2841, 2844-46, 92 L.Ed.2d 140 (1986).

---

[5] See, Rule 33(d), Tennessee Rules of Criminal Procedure. See also, n.6 *Supra*.

[6] Pictorials showing sexual contact between members of the same gender, far more innocuous than that shown in the materials in the case at bar (see, appendix ● pp. 3-4), have been considered by federal courts of appeal according to the *Mishkin* "deviant group" test of prurient appeal. *See, Huffman v. United States*, 470 F.2d 386, 402 (D.C. Cir. 1971); *United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 373 F.2d 635, 640 (4th Cir. 1967).

Federal courts of appeal have rendered inconsistent decisions as to the evidentiary showing as to contemporary community standards required to sustain an obscenity conviction where the sexual conduct depicted is such as typically would not appeal to the hypothetical member of the public at large. The Court of Appeals for the Tenth Circuit has opined:

> When the allegedly obscene materials are placed into evidence, the juries' overall background, including their familiarity with their communities' standards renders expert testimony unnecessary, if not irrelevant. ... Of course, this benefit occurs only when, ... the jury is from the community whose standards are applicable. Otherwise, capturing and conveying a community's "contemporary standards" vis-a-vis expert testimony is required, ...

United States v. Thomas, 613 F.2d 787, 792 (10th Cir. 1980). [Citations and footnotes omitted.]

In *United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1974), a case involving mate-

rials concededly directed at a homosexual audience and in which expert testimony indicated that the material would appeal to pedophiles, *Id.* at 373, n.5, the court opined, "... that expert testimony on contemporary community standards is desirable and may even be a necessary requirement of due process." *Id.* at 376.

The Court of Appeals for the Second Circuit has held that:

> material appealing to atypical sexual proclivities may be found "obscene" only when its dominant theme appeals to the prurient interest of a "clearly defined deviant sexual group." *Mishkin v. New York, [supra.]*
>
> ... [W]here the prurient interest is of a "deviant segment of society", the government must not only identify the deviant group, but must also establish that the material in question appeals to that group's prurient interest. Both facts are generally established through the use of expert testimony.

United States v. Petrov, 747 F.2d 824, 830 (2d Cir. 1984), cert den'd 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 318. [Citations omitted.]

The Court of Appeals for the Fourth Circuit has come close to rejecting *Mishkin* outright, holding, in a case involving bestiality films, that the district judge was not required to ask the jury to find whether there was such a thing as an average zoophiliac and the appeal of the subject films to such a person. *United States v. Guglielmi*, 819 F.2d 451, 454-55 (4th Cir. 1987), cert den'd 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679. *Compare, United States v. Treatman*, 524 F.2d 320, 322-23 (8th Cir. 1975).

The Court should grant certiorari in order to resolve the confusion in this area.

C. The Court of Criminal Appeals's construction of the prurient interest portion of the statutory definition is in conflict with decisions of this Court which prohibit shifting the burden of proof as to elemental facts in criminal cases.

In this and at least one previous case,[7] the Court of Criminal Appeals of Tennessee construed the portion of the Tennessee statute defining "prurient interest," T.C.A. § 39-6-1101(8), in light of *Mishkin v. New York*, *supra*, to mean that, before the State is required to show the obscene matter appeals to the prurient interest of members of a particular sexually deviant group, the accused has the burden of establishing that obscene matter is designed for and primarily disseminated to that group. (Appendix at pp. 7-8).

---

[7] *State v. Summers*, *supra*, 692 S.W.2d at 444-45 (Tenn.Crim.App. 1985).

To the knowledge of Counsel, this requirement is unique to Tennessee. The result achieved by this judicial gloss on the statute, which effectively shifts the burden of production as to a fact critical to criminal culpability, is inconsistent with the requirements of due process. *See, Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Any statutory device shifting the burden of production to the accused must satisfy due process requirements. *Id.*, 421 U.S. at 702, n.31, 95 S.Ct. at 1892.

This Court has recognized that any shifting of a burden of production or persuasion is particularly inappropriate in First Amendment cases:

> [S]ince only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, ... the procedures by which the facts of the case are

adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. ... It becomes essential, therefore, to scrutinize the procedures by which [a state seeks] to restrain speech.

* * *

It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, unless in so doing it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental. ... The legislature cannot place upon all defendants in criminal cases the burden of going forward with the evidence. ... Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, ...

Speiser v. Randall, 357 U.S. 513, 521-24, 78 S.Ct. 1332, 1339-41, 2 L.Ed.2d 1460 (1958). [Citations omitted; emphasis added.]

In the case of materials "aimed at homosexuals," the Defendant at bar was entitled to rely upon the State's failure to introduce extrinsic proof as to an element which was not within the common knowledge and experience of lay jurors.[8] At the close of the State's proof, this case was in the posture of lacking proof, as to some but not all materials, as to an essential element of the definition of obscenity. This Court has noted that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Vachon v. New Hampshire*, 414 U.S. 478, 480, 94 S.Ct. 664, 665, 38 L.Ed.2d 666 (1974).

To impose upon the accused any burden of production under the circumstances at bar,

---

[8] See Part B., *supra*.

as the unusual construction imposed by the Court of Criminal Appeals of Tennessee would require, would open the door for the State to offer rebuttal evidence in order to cure an initial failure of proof--a second bite at the apple which the Defendant's silence would otherwise preclude. On the other hand, for the Defendant to rest without offering proof would pose a significant risk of conviction as to the materials designed for the public at large. Such a Hobson's choice does not comport with fundamental fairness, and thus renders the definition of obscenity contained in the Tennessee statute unconstitutional.

D. Reexamination of *Miller v. California* by this Court is appropriate.

Since this Court ruled in *Roth v. United States*, *supra*, that obscene material is

outside the scope of First Amendment protection, six Justices, including the author of the *Roth* opinion, have concluded that *Roth* was wrongly decided and that government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults. *See, Pope v. Illinois*, 481 U.S. 497, 513, n.7, 107 S.Ct. 1918, 1927-28, n.7, 95 L.Ed.2d 439 (1987) (Stevens, J., dissenting). In addition, one other Justice has suggested the need for reexamination of *Miller v. California.*, *See, Pope, supra*, 481 U.S. at 505, 107 S.Ct. at 1923 (Scalia, J., concurring).

For the reasons set forth in the dissenting opinions of Justice Stevens in *Pope v. Illinois, supra*, and of Justice Brennan, joined by Justices Stewart and Marshall, in

Miller, supra, 413 U.S. at 47, 93 S.Ct. at 2627, and in *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. at 70, 93 S.Ct. at 2642, your Petitioner would urge this Court grant certiorari in order to overrule *Roth v. United States* and *Miller v. California* and declare that the First Amendment prohibits imposition of criminal penalties for simple possession or sale of obscene material.

CONCLUSION:

For the foregoing reasons in order to determine important questions of federal constitutional law, this Court should grant the petition for a writ of certiorari in this case and review the decision of the Court of Criminal Appeals of Tennessee.

Respectfully submitted,

Donald E. Dawson

DONALD E. DAWSON
Attorney of Record
for Petitioner
808 Broadway, Third Floor
Nashville, Tennessee 37203
(615) 726-0684

John E. Herbison

JOHN E. HERBISON
Attorney for Petitioner
1205 Eighth Avenue South
Nashville, Tennessee 37203
(615) 242-4200

CERTIFICATE OF SERVICE:

I certify that a correct and complete copy of the foregoing has been hand-delivered or mailed, first class postage prepaid, to the Honorable C. Anthony Daughtrey, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, and to the Honorable Stephen Bevil, Assistant District Attorney General, Suite 205 Hamilton County Justice Building, Chattanooga, Tennessee 37402, on or before the 2nd day of April, 1990.

JOHN E. HERBISON

APPENDIX:

[The following is the full text of the opinion of the Court of Criminal Appeals of Tennessee, review of which by certiorari is sought herein]:

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1989 SESSION

STATE OF TENNESSEE	)	
	)	C.C.A. No. 1119
Appellee,	)	
	)	Hamilton County
vs.	)	
	)	Douglas A. Meyer, Judge
JERRY C. PENDERGRASS,	)	
	)	(Possession of Obscene
Appellant.	)	Material with Intent to
	)	Distribute)

FOR THE APPELLANT:

John E. Herbison
Attorney at Law
1205 Eighth Ave., South
Nashville, TN 37203

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Pky.
Nashville, TN 37219-5025

C. Anthony Daughtrey
Assistant Attorney General
450 James Robertson Pky.
Nashville, TN 37219-5025

Gary D. Gerbitz
District Attorney General
Hamilton Co. Justice Bldg.
Chattanooga, TN 37402

Stephen M. Bevil
Asst. Dist. Attorney General
Hamilton Co. Justice Bldg.
Chattanooga, TN 37402

OPINION FILED: SEP 20 1989

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The appellant, Jerry C. Pendergrass, was convicted of six counts of possessing ob-

scene material with intent to distribute by a jury of his peers. The trial judge sentenced the appellant to pay a fine of $1,000 and serve six months in the local workhouse as to each count; and he ordered that the jail sentences are to be served concurrently. The effective sentence imposed by the trial judge is a fine of $6,000 and six months in the local workhouse.

After the trial court denied the appellant's motion for a new trial, he appealed as of right to this Court pursuant to Rule 3(b), Tenn. R. App. P.

ISSUES PRESENTED FOR REVIEW

The appellant has raised six issues for our review. He contends that the evidence is insufficient to sustain his convictions, the statute which proscribes the offense

for which he stands convicted is facially unconstitutional, the trial judge unduly restricted the cross-examination of prosecution witnesses, the trial judge committed error in permitting testimony as to the content of printed material, offered for sale in his book stores, that was not alleged to be obscene, the trial judge erred by refusing to give a special request regarding the meaning of "prurient interest," and the trial judge committed error in refusing to suspend his sentences and grant him probation.

SUFFICIENCY OF THE EVIDENCE

The appellant contends that the evidence contained in the record is insufficient to support his convictions. He argues the State failed to prove beyond a reasonable doubt that (a) the magazines and video

tapes appeal to the prurient interest of a hypothetical average member of the public at large, (b) the magazines and video tapes depicting homosexual activities appeal to the prurient interest of the homosexual community, and (c) the appellant possessed the materials alleged in the presentments.

The record reflects that on October 4, 1987, a police officer, David Carnes, entered an establishment known as Choo Choo Video and purchased a magazine entitled "All Tied Up." On this same date, Officer Carnes entered an establishment known as Keith Video/Broadway Books and purchased a magazine entitled "Motel Menage-A-Trois." On October 13, 1987, Officer Carnes returned to both establishments. He purchased a movie, "Good Sex," from the Choo Choo Video store and a movie entitled "Squirts" from Keith Video/Broadway Books.

On October 23, 1987, a second police officer, Glenn Lemley, visited both Keith Video/Broadway Books and Choo Choo Video. He purchased two magazines, "Anal Climax" and "A Hole Lot of Fucking," from Keith Video/Broadway Books. He also purchased two magazines, "Fuck Sucking Trios" and "Best of the Orient," from Choo Choo video.

The magazines "Motel Menage-A-Trois"[1] and "All Tied Up,"[2] and the video tapes "Squirts"[3] and "Good Sex,"[4] graphically depict men engaged in various forms of

---

[1]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171235.

[2]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171237.

[3]The appellant is alleged to have possessed this video tape with the intent to distribute in presentment number 171243.

[4]The appellant is alleged to have possessed this video tape with the intent to distribute in presentment number 171241.

sexual conduct.[5] The sexual conduct includes fellatio, anal intercourse, masturbation, as well as other forms of sexual conduct. The magazines "A Hole Lot of Fucking,"[6] "Anal Climax," [7] "Best of the Orient,"[8] and "Fuck Sucking Trios,"[9] graphically depict men and women engaged in

---

[5]The magazine "Motel-Menage-A-Trois" involves three men engaged in homosexual conduct together. The remaining matter depicts two men engaged in such activity. "Squirts" contains two episodes, "Laundry List" and "Oriental Shower." "Good Sex" involves three different men engaged in sexual conduct with the same partner, but at different times.

[6]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171245.

[7]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171245.

[8]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171239.

[9]The appellant is alleged to have possessed this magazine with the intent to distribute in presentment number 171239.

various forms of sexual conduct.[10] The sexual conduct depicted in these magazines includes vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, as well as other forms of sexual conduct. In two of the magazines, a dildo is placed in the woman's vagina and simultaneously inserted into her vagina and rectum.

T.C.A. § 39-6-1104(a) provides in part that "[i]t shall be unlawful to knowingly . . . possess with intent to distribute . . . any obscene matter." Consequently, before a person can be convicted of knowingly possessing obscene matter with the intent to distribute, it must be established beyond a reasonable doubt that the accused (a) knowingly, (b) possessed, (c)

---

[10]"Anal Climax" involves two women and a man engaged in sexual activity together. The remainder of the magazine depicts a man and a woman engaged in sexual activity.

obscene matter, (d) with the intent to distribute the matter.

The term, "knowingly," as used in the statute, means to have "actual or constructive knowledge of the subject matter."[11] A person is deemed to have "constructive knowledge" of the content of the matter "if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."[12] The record clearly establishes that the appellant "Knowingly" possessed the obscene matter with the intent to distribute. The appellant owned ninety-five percent (95%) of Keith Video/Broadway Books and Choo Choo Video, and he received the same percentage of the profits. He served as president of the corporation which owned the companies.

---

[11]T.C.A. § 39-6-1101(3).

[12]T.C.A. § 39-6-1101(3).

He testified that he personally ordered the merchandise sold in both stores, he had examined some of the magazines sold in both stores, and he further testified that "we" unpacked and sealed the magazines in clear, plastic containers before placing them on the shelves for sale. See State v. Summers, 692 S.W.2d 439, 446 (Tenn. Crim. App. 1985).

The word, "possession," as used in the statute, embraces both actual and constructive possession. When obscene matter is found on the premises owned or in the possession of a person, a rebuttable inference arises that the person owned or possessed the obscene matter. However, the mere presence of a person in the area where the obscene matter is discovered is not, alone, sufficient to support a finding that the person possessed the obscene matter; nor is

the mere association with a person who controls obscene matter sufficient, standing alone, to support a finding that the person possessed the obscene matter. Before a person can be found to constructively possess obscene matter, it must appear that the person has the power and intention, at a given time, to exercise dominion and control over the matter, directly or through others.

As previously indicated, the appellant owned practically all of the stock of the corporation which owned both stores, he served as president of the corporation, and received ninety five [sic] (95%) of the profits. He ordered the merchandise sold in both establishments, had examined some of the magazines sold by the stores, and indicated that he participated in preparing the materials and placing some on the

shelves. When the trial judge later padlocked Keith Video/Broadway Books and Choo Choo Video, the appellant transported the inventory to Johnson City, Tennessee, and opened a new store. In addition, there was testimony that the appellant was seen inside the store by a police officer on several occasions.

A magazine, motion picture film, or other pictorial representation[13] is deemed obscene if (a) the average person, applying contemporary community standards,[14] would find that the work, taken as a whole, appeals to the prurient interest,[15] (b) the work depicts or describes, in a patently

---

[13]T.C.A. § 39-6-1101(4).

[14]T.C.A. § 39-6-1101(1). The term "community," as used in the Act, "means the state of Tennessee."

[15]T.C.A. § 39-6-1101(5)(A). T.C.A. § 39-6-1101(8) defines the term, "prurient interest," as "a shameful or morbid interest in sex."

offensive way, sexual conduct,[16] and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[17] Based upon our review of the matter hereinabove set forth, and applying the community standards of the State of Tennessee, we conclude that the magazines and video tapes clearly (a) appeal to a shameful or morbid interest in sex, (b) depict sexual conduct in a manner which substantially exceeds the customary limits of candor, and (c) lacks serious literary, artistic, political, or scientific value. See State v. Hunt, 660 S.W.2d 513, 519-20 (Tenn. Crim. App. 1983); State

[16]T.C.A. § 39-6-1101(5)(B). T.C.A. § 39-6-1101(9) defines the phrase "sexual conduct." The definition of this phrase encompasses the conduct contained in the video tapes and magazines purchase [sic] by the police officers from both establishments.

[17]T.C.A. § 39-6-1101(5)(C).

v. Davis, 654 S.W.2d 688, 695 (Tenn. Crim. App. 1983).

The term, "matter," as used in the statute, is broad enough to encompass the magazines and video tapes which formed the basis of the prosecutions against the appellant.[18]

The term "distribute," as used in the statute, means "to transfer possession of, whether with or without consideration."[19] It was clearly established that the obscene matter in these cases was possessed with the intent to distribute. Both businesses were retail establishments, and the matter was possessed for sale, as evidenced by the purchase prices that appear on the face of some of the magazines, and the purchase of the matter by plain clothes police offi-

[18]T.C.A. § 39-6-1101(4).

[19]T.C.A. § 39-6-1101(2).

cers. In addition, the appellant stated that he received ninety-five [sic] (95%) of the profits from the sale of the matter.

The appellant's contention that the State failed to establish that the magazines and video tapes depicting homosexual activities appealed to the prurient interest of the homosexual community is devoid of merit. There is nothing contained in the record which establishes that these magazines and video tapes were designed for or primarily disseminated to a particularly sexually deviant group. State v. Summers, 692 S.W.2d 439, 444-445 (Tenn. Crim. App. 1985). The record reflects that these magazines and video tapes were for sale to the public, regardless of sexual preferences.

It has long been established that the accused has the burden in these proceedings

to establish that the obscene matter is designed for or primarily disseminated to a particularly sexually deviant group before the State is required to show the obscene matter appeals to the prurient interest of the members of that group. State v. Summers, supra at 445. See Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966). Since the appellant failed to establish that these particular magazines and video tapes were designed for or primarily disseminated in the homosexual community, the prurient interest requirement must be determined in the same manner as the magazines depicting heterosexual conduct.

As can be seen, there is sufficient evidence contained in the record from which a rational trier of fact can conclude that the appellant knowingly possessed obscene

matter with the intent to distribute, as charged in the six presentments, beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

This issue is without merit.

CONSTITUTIONALITY OF OBSCENITY LAWS

While the appellant challenges the constitutionality of the obscenity laws of this jurisdiction, he concedes that the Tennessee Supreme Court has ruled that these statutes pass constitutional muster. See Leech v. American Booksellers Assoc., Inc., 582 S.W.2d 738 (Tenn. 1979); Taylor v. State ex rel. Kirkpatrick, 529 S.W.2d 692 (Tenn. 1975); State v. Davis, 654 S.W.2d 688 (Tenn. Crim. App. 1983); State v. Hunt, 660 S.W.2d 513 (Tenn. Crim. App. 1983). This Court is bound by the deci-

sions of our Supreme Court. Parker v. Brock, 535 S.W.2d 337 (Tenn. 1976); State v. Davis, supra.

This issue is without merit.

LIMITATIONS PLACED ON CROSS-EXAMINATION OF WITNESSES

During cross-examination, defense counsel asked Officer Carnes: "When you watched these movies in the courtroom today, did you become sexually aroused?" The assistant district attorney general interposed an objection to the question. The trial judge sustained the objection.

Defense counsel filed an affidavit post-trial. The affidavit recites that defense counsel would have asked all prosecution witnesses the question posed to Officer Carnes. In addition, he would have asked the following questions:

When you viewed this material, did it excite lustful thoughts?

When you viewed this material, did it make you itch?

When you viewed this material, did you long for sex?

When you viewed this material, did you become uneasy with desire or longing?

When you viewed this material, did it provoke itching, morbid or lascivious longings?

This issue has been waived. When the trial court ruled the question propounded by defense counsel was improper, counsel should have requested a jury-out hearing so that he could make a proffer of proof. During the hearing, counsel could have asked the question propounded, as well as the questions he said he would have asked, but for the ruling of the trial judge. See Tenn. R. App. P. 36(a). However, we opt to address this issue on the merits.

It has long been established that the propriety, scope, and control of the examination of witnesses rest within the sound discretion of the trial court; and this Court will not interfere with the exercise of this discretion unless it clearly appears upon the face of the record that the trial court abused its discretion when ruling. Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948). This rule applies to the cross-examination of witnesses. State v. Manning, 490 S.W.2d 512, 515 (Tenn. 1973); Edwards v. State, 221 Tenn. 60, 66, 424 S.W.2d 783, 786 (1968); State v. Fowler, 213 Tenn. 239, 353 [sic], 373 S.W.2d 460, 466 (1963). In this case, we cannot say that the trial judge abused his discretion in ruling that the question propounded was improper.

The questions defense counsel says he would have asked cannot be considered because the questions do not appear in the transcript of the proceedings. Tenn. R. App. P. 36(a). Furthermore, the trial court was not given the opportunity to rule upon the propriety of these questions.

This issue is without merit.

INTRODUCTION OF EVIDENCE THAT WAS NOT ALLEGED TO BE OBSCENE

A police officer testified that the inventory of the two establishments, Keith Video/Broadway Books and Choo Choo Video, depicted acts of bondage, sadomasochism, torture, people being tied up, gagged and beaten, the use of leather goods and whips, as well as people wearing masks. There was also evidence that the inventory of both establishments included inflatable dolls, rubber penises, and plastic or rubber items

of the male and female sex organs. The defendant argues these materials were not included in the presentments, and, furthermore, this testimony was not relevant to the inquiry before the court.

The witnesses testified that the appellant was not present in either store when the purchases were made. There was testimony that the appellant was present when a third police officer entered the store and made a purchase. Consequently, the State was required to show that the appellant had constructive knowledge and possession of the magazines and video tapes which formed the basis of the prosecutions against him.

This evidence was relevant to show that the appellant, as owner, operator, and president of the corporation which owned both establishments, had knowledge of sufficient facts that would put a reasonably

prudent person on notice as to the suspect nature of the material. Consequently, this evidence was relevant, as well as probative, of an essential element of the prosecution's case. See State v, Banks, 564 S.W.2d 947, 951 (Tenn. 1978).

This issue is without merit.

REFUSAL OF SPECIAL REQUEST

The appellant submitted a special request which contained a definition of the phrase "prurient interest". The trial court refused to incorporate the special request into the charge given to the jury. The appellant contends that the trial court committed error of prejudicial dimensions in this regard. We disagree.

An examination of the charge given by the trial judge reveals that the charge included a full and complete explanation of

the phrase "prurient interest". Consequently, the trial judge did not commit error in refusing to give the appellant's special request. See Edwards v. State, 540 S.W.2d 641, 649 (Tenn. 1976), cert. denied, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777 (1977); Douglass v. State, 213 Tenn. 643, 646, 378 S.W.2d 749, 750 (1964); Bostick v. State, 210 Tenn. 620, 630-631, 360 S.W.2d 472, 477 (1962); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); State v. Summers, supra at 445.

This issue is without merit.

DE NOVO REVIEW OF SENTENCE

The appellant contends that the trial court should have suspended his sentences and placed him on probation. He argues that the trial judge conditioned the grant of probation upon defendant's agreement to

close the two establishments he was presently operating.

The appellant operated two establishments, Keith Video/Broadway Books and Choo Choo Video, until they were ordered padlocked by trial court. The appellant subsequently opened an identical establishment, using the inventory from the two padlocked stores, in Johnson City, Tennessee. Shortly after the store was opened, the local authorities seized the inventory. The appellant returned to Chattanooga and opened two new establishments. He was operating the new establishments when the trial court sentenced him.

The appellant testified he sold adult merchandise in his new stores. The merchandise was described as "similar" to the merchandise sold in his previous stores,

but he denied selling any of the magazines or video tapes found to be obscene by the jury.

The trial court, aware that the appellant was engaged in selling merchandise "similar" to what was found by the jury to be obscene, told defense counsel:

> I'm not going to engage in censorship, but if Mr. Pendergrass closes his places of business within seven days, completely closed them and does not turn those operations over to some other individual, then the Court would consider at that time whether or not he should have to serve active time or whether or not he should serve some form of alternative punishment.

Defense counsel immediately advised the trial court that the appellant would not close the two stores.

As long as the appellant continued to distribute obscene matter, he was not entitled to have his sentences suspended and be placed on probation. This also

illustrates that the appellant was unwilling to rehabilitate himself. In addition, if probation had been granted, the appellant would have been in violation of the conditions of his probation. It is generally provided that a probationer must obey the laws of the United States, the laws of this State, along with any county and city regulations.

Based upon our de novo review of the record, the appellant was not a good candidate for probation in any event. His testimony reveals that he has a lack of remorse for the offenses of which he stands convicted. He takes the view that what he sold in his previous stores, and what he was selling in the new stores, is not obscene. Apparently, a jury must decide whether or not the materials are obscene on a piece-by-piece basis.

The record reflects that the appellant has a history of criminal convictions and behavior. His convictions include driving under the influence, two counts, operating a motor vehicle without a license, felonious assault, carrying a pistol, interfering with a police officer, and the unlawful operation of a business. There was an indictment pending against the appellant for the unlawful possession of a controlled substance when he appeared for sentencing.

The appellant refused to comply with the request of the pre-sentence officer regarding financial statements. He was asked on several occasions to provide some documentation regarding his financial status. These included personal income tax returns, tax returns of the corporation, or a statement from his accountant. Nothing

was ever submitted. The appellant stated his records were burned in a fire. If the appellant desired to cooperate, he could have furnished the records that were retained by the certified public accountant hired by the corporation; and he could have made application for copies of his federal income tax returns through the Internal Revenue Service.

The question of deterrence is also relevant in this case. The denial of probation on this ground was necessary to deter the appellant from engaging in the same or similar conduct for which he was convicted, as well as to deter others who are engaged in the same or similar business.

This issue is without merit.

/s/
JOE B. JONES, JUDGE

JOE D. DUNCAN, PRESIDING JUDGE

WILLIAM P. NEWKIRK, SPECIAL JUDGE

[The following is an excerpt from the transcript of the hearing in the Criminal Court for Hamilton County Tennessee of the Petitioner's Motion for New Trial. It is included in this appendix for the purpose of showing the trial court's finding of fact as to the intended recipient group of certain materials which are the subject of this prosecution]:

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE,	)	Cases No. 169669
Appellee,	)	169671
	)	169673
	)	
	)	169687
VS.	)	169689
	)	169691
	)	161693
	)	
CHOO CHOO VIDEO	)	171235
and	)	171237
KEITH VIDEO/BROADWAY	)	171239
BOOKS and	)	171241
JERRY C. PENDERGRASS,	)	171243
Appellants	)	171245

TRANSCRIPT OF
MOTION FOR NEW TRIAL
MOTION TO CORRECT OR REDUCE SENTENCE
MOTION FOR JUDGMENT OF ACQUITTAL

Volume One of One Volume

THE HONORABLE DOUGLAS A MEYER, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

Mr. Stephen M. Bevil
Assistant District Attorney General
Hamilton County Justice Building
Chattanooga, TN 37402

FOR THE APPELLANTS:

Mr. John E. Herbison
Attorney-at-Law
1205 Eighth Avenue South
Nashville, Tennessee 37203

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE	)	Cases No. 169669, 169671
	)	and 169673
vs.	)	
CHOO CHOO VIDEO	)	Cases No. 169687, 169689,
and	)	169691 and 169693
KEITH VIDEO/BROADWAY BOOKS	)	Cases No. 171235, 171237,
and	)	171239,171241,171243
JERRY C. PENDERGRASS	)	and 171245

These cases came to be heard on the 21st day of October, 1988, before the Honorable Douglas A. Meyer, Judge, holding the Criminal Court for Hamilton County, at Chattanooga, Tennessee, on Motion for New Trial, Motion to Correct or Reduce Sentence, and Motion for Judgment of Acquittal, and tne following proceedings were had, to wit:

* * *

[After hearing the argument of counsel on the motion for new trial and motion for judgment of acquittal, the trial court announced his decision overruling both motions. The following is excerpted from pages 13 and 14 of the transcript]:

* * *

THE COURT: All right. For the reasons I've set out during our discussion while you were making your presentation and the rulings I made during the course of the trial, let your motion for new trial and judgment of acquittal be denied.

Of course, you have thirty days to perfect an appeal.

MR. HERBISON: Your Honor, will there be a written order in that"

THE COURT: When this hearing is typed up, that will be the Court's written finding of fact.

MR. HERBISON: Okay. Your Honor, are you making a finding of fact that the materials were in fact designed to appeal to a specific deviant group?

THE COURT: Yes.

MR. HERBISON: Each material?

THE COURT: Yes, definitely. There's no question in my mind. The forty-five minutes watching that second movie is probably the worst forty-five minutes I've spent in almost fifty-six years, without question.

MR. BEVIL: Of course, Your Honor, the magazines were a little bit different. Some of the magazines dealt with homosexual material. Some of them dealt with heterosexual material.

THE COURT: Yes, some of them dealt with---I think one of them had a three-some in it or something, so some of it was heterosexual, the magazines. But the two movies that we saw, one short and one longer forty-five minute movie were definitely aimed at homosexuals. But there was one magazine that showed a threesome.

MR. HERBISON: Yes. Is the Court making a finding as to that particular magazine, as well?

THE COURT: That particular magazine would be---I guess it would appeal to heterosexuals.

MR. HERBISON: Heterosexual segment of the public at large?

THE COURT: Yes.

Now you've got another motion?

* * *

[The following is an excerpt from the transcript of the September 1, 1988 sentencing hearing in the Criminal Court for Hamilton County, Tennessee. Such hearing involved only the individual Defendant Jerry C. Pendergrass. This excerpt is included in this appendix for the purpose of showing the remarks of the trial court on which the sentencing issue raised herein is based.]:

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE, Appellee,	)	Cases No. 171235
	)	171237
	)	171239
	)	171241
	)	171243
	)	171245
VS.	)	
	)	
	)	
JERRY C. PENDERGRASS, Appellant.	)	
	)	

TRANSCRIPT OF SENTENCING HEARING

Volume One of One Volume

THE HONORABLE DOUGLAS A MEYER, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

Mr. Stephen M. Bevil
Assistant District Attorney General
Hamilton County Justice Building
Chattanooga, TN 37402

FOR THE APPELLANTS:

Mr. John E. Herbison
Attorney-at-Law
1205 Eighth Avenue South
Nashville, Tennessee 37203

[Table of Contents and List of Exhibits omitted.]

* * *

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE, DIVISION I

STATE OF TENNESSEE	)	Cases No. 171235, 171237,
	)	171239, 171241
vs.	)	171243, 171245
	)	
JERRY C. PENDERGRASS	)	

These cases came to be heard on the 1st day of September, 1988, before the Honorable Douglas A. Meyer, Judge, holding the Criminal Court for Hamilton County, for sentencing, and the following proceedings were had, to wit:

* * *

[After hearing evidence offered by the Defendant and the arguments of counsel, the trial court pronounced sentence. The following is excerpted from pages 57 though 61 of the transcript]:

* * *

THE COURT: . . . Then in setting the punishment the Court in considering the testimony I heard in court, the testimony I've heard here today, and applying the guidelines set out in the Sentencing Act, the Court would set his punishment at six months in the penal farm in each case, which is the maximum that the Court can set. Also, the sentences would run concurrently because under the guidelines of Gray v. State, there's no way that I could order these sentences to be served consecutively. So they would all be concurrent, six month sentences. And, of

course, the jury has already imposed $1,000 fine in each case, for a total of $6,000 in fines.

The question of whether or not he should be incarcerated is one of difficulty for the Court for this reason. The Court received a report from the grand jury yesterday.

I do not have to listen to anybody from the audience, Mr. Martino, so just keep your seat.

Yesterday the grand jury reported and they reported on the fact that we have extensive overcrowding in our jail and extensive overcrowding in the penal farm and, of course, in the Department of Corrections. In fact, we are holding approximately a hundred and twenty something individuals in this jail that have been sentenced to the Department of

Corrections that cannot be accepted by the Department of Corrections because they do not have available bed space for those individuals. In the next three years we're going to--the crisis is going to get worse as far as incarceration of individuals. Our space in the jail and the workhouse and in the penitentiary are going to have to be reserved for dangerous offenders, those that have committed violent crimes or potentially capable of committing violent crimes, also for the habitual offenders, those that continue to violate the law over and over again and are not deterred at all by any punishment imposed. And then the last category has to be--you have to have some space for individuals that you can't punish any other way. And Mr. Pendergrass comes extremely close to being in that third category. And that's what gives the

Court difficulty is because I'm not sure that I can punish Mr. Pendergrass in any other way than locking him up.

The reason that it results in difficulty for me is the fact that it's not an easy decision. Censorship is bad. I can't see how anybody in a democracy could be in favor of censorship. And the Court is not in favor of censorship at all. But saying that, this Court has to follow the law the same as anyone else. And obscenity is not protected in this country. Obscenity is against the law. Mr. Pendergrass has been found guilty of possessing obscene material. He must be punished. Society has the right to punish individuals when they violate the law. So he has to be punished because that punishment has to be a deterrent not only to Mr. Pendergrass but for all other individuals that might be also

tempted to violate the law. Each time that I've observed Mr. Pendergrass in the courtroom, and especially when I would observe him on television, as I observed him on television last night, he insists, of course, that he's going to do what he wants to do. And far be it from me to tell him he cannot exercise his constitutional rights, and he can exercise those rights right up to the point where he steps over the line and violates the law. But it doesn't really behoove him to skirt right up to the line each time like he does. It's not really very smart for an individual defendant to insist on skirting right up to the line and staying on the line because if there's an error in judgment then, of course, he may suffer from that.

I'm not going to engage in censorship but if Mr. Pendergrass closes his places of business within seven days, completely closes them and does not turn those operations over to some other individual, then the Court would consider at that time whether or not he should serve some form of alternative punishment. [Emphasis added.] So I'm going to put the matter over a week and give him an opportunity to decide whether or not he wants to continue operating a business which he and the whole general public realize that he is continuing in at the time, or operating at the time that he was found guilty by a jury of possessing obscene material. He knows, as well as I know, that using the guidelines as set out in the Federal decisions that a jury in this community would determine that the material he has out there right now to be

obscene. He knows that, as well as I know that. The jury, of course, does not determine themselves what they consider to be obscene, but they apply the standard of the average person in the community. And he knows, as well as I do, that the average person in this community would find what he is selling out there to be obscene. So I'm giving him seven days to close up his operation.

Mr. Pendergrass, from the pre-sentence report indicates that he's a very good furniture man, that he's been in the furniture business before, he's been very successful in selling furniture. There's no reason why Mr. Pendergrass can't go back into the furniture business and stay out of the selling of material that may be obscene. It's his choice, or he can make the choice today.

I'll give you time to consult with him if you would like.

MR. HERBISON: Your Honor, Mr. Pendergrass advises me that he's unwilling to close his operations.

THE COURT: All right. Then I'll order the six month sentence to be served in the penal farm.

* * *

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

JUNE 1989 SESSION

FILED
OCT 16 1989
ROBERT W. SUMMAR, CLERK

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 1119
	)	
vs.	)	Hamilton County
	)	
JERRY C. PENDERGRASS,	)	
	)	
Appellant.	)	

ORDER DENYING PETITION TO REHEAR

The appellant, Jerry C. Pendergrass, has filed a courteous petition to rehear pursuant to Rule 39, Tenn. R. App. P.

After a thorough review of the petition, this Court is of the opinion the petition

is without merit. Accordingly, the petition to rehear is denied.

ENTER this _____ day of October, 1989.

/s/
JOE D. DUNCAN, JUDGE

/s/
JOE B. JONES, JUDGE

/s/
WILLIAM P. NEWKIRK, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
v. CCA No. 1119	)	HAMILTON CRIMINAL
	)	
JERRY C. PENDERGRASS,	)	
	)	
Appellant.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

MOTION TO CORRECT OR REDUCE
SENTENCE FILED: SEPTEMBER 28, 1988
(DEFENDANT PENDERGRASS)
A. LEON HALEY JR., CLERK

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE, DIVISION I

STATE OF TENNESSEE	)	
	)	
vs.	)	Nos. 171235, 171237,
	)	171239, 171241, 171243
JERRY C. PENDERGRASS	)	and 171245

MOTION TO CORRECT OR REDUCE SENTENCE

Comes now the Defendant, Jerry C. Pendergrass, by and through his attorney, John E. Herbison, pursuant to Rule 35(b) of the Tennessee Rules of Criminal procedure, and moves this Court to modify the sentence imposed upon the Defendant on September 1, 1988 by suspending execution of the six (6) month period of incarceration and placing the Defendant on probation pursuant to

Tennessee Code Annotated § 40-21-101 et seq.

In support of this Motion the Defendant would show that the Court's decision to suspend execution of the period of incarceration subject to the Defendant's forbearance to exercise his right to operate a bookstore dealing in printed and pictorial matter, which matter is presumptively protected by the First Amendment to the United States Constitution and by Article I, § 19 of the Constitution of the State of Tennessee, amounts to a palpable abuse of discretion in that it exceeds the limits of authority of this Court imposed by the First and Fourteenth Amendments to the United States Constitution and by Article I, §§ 8 and 19 of the Constitution of the State of Tennessee.

A Memorandum of Law in support of this Motion is filed contemporaneously. In consideration of the significant constitutional issues involved and in order to facilitate appellate review should this Motion be denied, the Defendant respectfully requests a hearing on this Motion, and the Defendant further requests that, in the event that this Motion is denied, the Court state in writing the reasons for such denial.

The Defendant requests that this Motion be set for hearing on October 21, 1988 along with other post-trial motions in these causes.

Respectfully submitted,

/s/

JOHN E. HERBISON
Attorney for Defendant
1205 Eight Avenue South
Nashville, Tennessee 37203
(615) 254-6300

MOTION FOR JUDGMENT OF ACQUITTAL
(defendant Pendergrass)

FILED: SEPTEMBER 28, 1988
A. LEON HALEY JR., CLERK

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE, DIVISION I

STATE OF TENNESSEE	)	
	)	
vs.	)	Nos. 171235, 171237,
	)	171239, 171241, 171243
JERRY C. PENDERGRASS	)	and 171245

MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the Defendant, Jerry C. Pendergrass, by and through his attorney, John E. Herbison, and having moved for judgment of acquittal at the close of the State's case-in-chief pursuant to Rule 29(a) of the Tennessee Rules of Criminal Procedure, hereby renews such Motion for Judgment of Acquittal pursuant to Rule 29(c) in each of the above-styled causes.

The Defendant would aver that the evidence in each of these causes is insufficient to sustain a conviction in that the materials alleged to be obscene are, as a matter of law, no obscene in that no jury could reasonably conclude that such materials, according to contemporary community standards, both (1) appeal to the prurient interest of the average person and (2) depict or describe sexual conduct in a patently offensive way.

The Defendant would argue in the alternative that, where the State presents proof and argues that material alleged to be obscene is designed to appeal to or intended to reach a specific deviant group, the Due Process clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land clause of Article I, § 8 of the Constitution of the State of Tennessee

require that the State present evidence of what material would appeal to the prurient interest of a hypothetical average member of such group, according to contemporary community standards, in addition to and apart from the allegedly obscene material itself, and that, in the absence of such additional proof, the materials alleged to be obscene are, as a matter of law, by themselves insufficient to sustain a conviction.

Respectfully submitted,

/s/

JOHN E. HERBISON
Attorney for Defendant
1205 Eight Avenue South
Nashville, Tennessee 37203
(615) 254-6300

MOTION FOR NEW TRIAL
(defendant Pendergrass)

FILED: SEPTEMBER 28, 1988
A. LEON HALEY JR., CLERK

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE, DIVISION I

STATE OF TENNESSEE	)	
	)	
vs.	)	Nos. 171235, 171237,
	)	171239, 171241, 171243
JERRY C. PENDERGRASS	)	and 171245

MOTION FOR NEW TRIAL

Comes now the Defendant, Jerry C. Pendergrass, by and through his attorney, John E. Herbison, pursuant to Rule 33 of the Tennessee Rules of Criminal Procedure, and moves this Court to set aside the verdicts and grant new trials in the above-styled causes.

The Defendant would assert as grounds for granting an new trial in this matter the following:

1) The Court erred by refusing to give the following jury instruction requested by the Defendants:

> "Prurient interest" means a shameful or morbid interest in sex. Material which appeals to the prurient interest is material having a tendency to excite lustful thoughts. The word, "prurient," means "itching; longing; uneasy with desire or longing, of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd.

2) The Court erred by sustaining the State's objections to Defense Counsel's questions of the witness David Carnes, "When you watched this movie in the courtroom, did you become sexually aroused?" and "When you watched this movie in the courtroom, how did you feel?" and by indicating that similar questions would not be permitted. These Defendant aver that the Court's refusal to permit this line of questioning

amounts to a denial of the right of confrontation of witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, § 9 of the Constitution of the State of Tennessee. In support of this assignment of error, the Defendant would rely upon the affidavit of Defense Counsel, attached as an exhibit to this Motion and here incorporated by reference.

3) The Court erred by admitting testimony by the witness Lieutenant Roy Glenn as to the content of printed material offered for sale or display at the Defendant's workplace, which material was not alleged to be obscene.

4) The statute of which the Defendant was convicted of violating, Tennessee

Code Annotated § 39-6-1104, is facially unconstitutional.

The Defendant requests, pursuant to Rule 33(d) of the Tennessee Rules of Criminal Procedure, that the Court make and state into the record findings of fact and conclusions of law to explain his ruling on any issue raised herein which was not determined by the jury.

Respectfully submitted,

/s/

JOHN E. HERBISON
Attorney for Defendant
1205 Eight Avenue South
Nashville, Tennessee 37203
(615) 254-6300

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
vs.	)	No. 1119
	)	
JERRY C. PENDERGRASS,	)	
	)	
Defendant-Appellant.	)	

ORDER GRANTING DEFENDANT-APPELLANT'S APPLICATION FOR STAY OF MANDATE AND FOR RELEASE ON BOND PENDING REVIEW BY UNITED STATES SUPREME COURT

The Defendant, a convicted misdemeanant, has applied for a stay of the mandate of this Court of Criminal Appeals pending application for certiorari in the United States Supreme Court. Upon consideration of such application, the undersigned finds the application to be well-taken and the same is granted.

The Defendant shall be entitled to release from custody upon posting of bond in the amount of two thousand dollars ($2,000.00).

SO ORDERED. ENTER this 5th day of January, 1990.

/s/
JOSEPH B. JONES, JUDGE
For the Court